

FRIDAY NDLOVU

And

ELPHIAS SIBANDA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU AND CHEDA JJ
BULAWAYO 8 OCTOBER 2012 AND 1 NOVEMBER 2012

Mr J. Tshuma for the appellants
Mr L Maunze for the respondent

Appeal

CHEDA J: This is an appeal against sentence only.

The appellants were charged with contravening section 59 of the Parks and Wildlife Act [Chapter 20:14], which deals with hunting, removal, viewing and sale of animals and animal product. They pleaded guilty, were convicted and sentenced to 24 month imprisonment of which 6 months imprisonment was suspended for 5 years on the usual condition of good future conduct in relation to the said Act.

The brief facts which are common cause are that the two appellants left their respective homes and went to poach and/or hunt animals at Debshan Ranches, in the Shangani area. They armed themselves with a .303 Rifle. They hunted and killed an Impala valued at US\$500-00 and only US\$6-00 worth of meat was recovered at their homes.

Appellants have argued that the court *a quo* misdirected itself by exceeding its jurisdiction of 12 months or a fine not exceeding level six.

Respondent is in agreement with their submission.

The learned trial magistrate did not notice that section 59(5) of the Parks and Wildlife Act was amended by the Criminal Penalties Amendment Act [Chapter 22:01] as rightly pointed out by Mr *Maunze* for respondent.

The error made by the learned trial magistrate admits of no doubt. The general rule of these courts is that an appeal court is reluctant and slow in interfering with the sentencing discretion of a trial court. However, it can interfere if the sentence is manifestly excessive to an extent of inducing a sense of shock or it is vitiated by irregularity or misdirection, see *S v Ramushu* SC 25/93.

It is clear in the present case that the court *a quo* misdirected itself in passing sentence as it exceeded its sentencing limit. In light of that misdirection, this court, is therefore, at large to interfere with the sentence imposed in order to restore justice.

Appellants have argued that the court *a quo* did not give sufficient weight to the mitigatory features of this case hence its imposition of a harsh sentence. Where the legislature sets down a maximum sentence, the courts should not be easily tempted to impose the maximum in the circumstances. In that regard I fully associate and align myself with the remarks by UCHENA J in *S v Hunda and another* HH 124/10 stated;

“a judicial officer must avoid imposing sentences around the maximum level of the range for cases which are far from being the worst examples of the particular crime. He must carefully consider the appropriate sentence for each case, bearing in mind that the least sentence is for the least serious example, and the maximum sentence is reserved for the worst example of that crime.”

While indeed there are mitigatory factors which need to be taken into consideration, in this matter there are however very serious aggravating factors which in my view far much outweigh their personal circumstances. Appellants were hunting in a farm armed with a firearm. They both have livestock of their own, that is first appellant has 6 goats while second appellant has 6 donkeys and 4 goats. It can not therefore be said that they were hunting as a result of starvation, but, it was clearly greed on their part. For that reason a non-custodial sentence is not suitable in the circumstances. They deserve incarceration.

The court takes judicial notice that the rate of poaching has reached to alarming proportions and there is therefore a need to stem this tide lest the country's wildlife be depleted sooner than later.

In conclusion therefore this is the order:

- (1) The conviction is confirmed
- (2) The sentence is set aside and is substituted by the following:

(2:1) each appellant 9 months imprisonment of which 3 months imprisonment is suspended for 5 years on condition appellants does not within that period commits any offence involving contravening section 59 of the Parks and Wildlife Act [Chapter 20:14] for which upon conviction he is sentenced to imprisonment without the option of a fine.

Webb, Low & Barry, appellants' legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners

Cheda J.....

Ndou J agrees.....